80-1642

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CASE NO:
APPELLATE NUMBER: 79-5730

in the Supreme Court of the United States

PATRICK LORING ROBINSON and
MATTHEW WILFORT MADSEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Whether the out of court declarations and confessions of a co-defendant admitted pursuant to Federal Rules of Evidence 804(b)(3) violated the defendants' sixth amendment right to confrontation?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on January 26, 1981. Rehearing was denied March 4, 1981.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed at F.2d and is printed in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 26, 1981. Rehearing was denied March 4, 1981. The jurisdiction of this Court is invoked under 28 USC 1254.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Petitioners herein, PATRICK LORING ROBINSON and MATTHEW WILFORT MADSEN, along with co-defendants, Kenneth W. Register, Thomas Henry DeLoach, James Mann Erwin and Jerold Emery Anderson were brought to trial pursuant to an indictment returned by the Grand Jury on August 14, 1979 charging Petitioner, ROBINSON with kidnapping, possessing and distributing narcotics, and controlled substances and Petitioner, MADSEN, with kidnapping and possessing a controlled substance with intent to distribute. (R-8)

Trial commenced on December 3, 1979. The jury returned a verdict on Petitioner, ROBINSON of guilty on Counts III and IX and a verdict on Petitioner, MADSEN of guilty on Count III only. (R-118, 127). None of the remaining co-defendants were convicted. Notice of Appeal was timely filed on December 11, 1979. (R-121)

Judgment was affirmed by the Fifth Circuit Court of Appeals on January 26, 1981. The Court in part ruled that the admission of a co-defendant's confession which implicated the Defendants could properly be admitted at trial even in the absence of the declarant taking the stand and being available for cross examination, based upon *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978). In particular, the Court ruled that there is no conflict between the admission of declarations against penal interest as provided for in Federal Rules of Evidence 804(b)(3) and the Defendants' Sixth Amendment right to confrontation. Motion for rehearing en banc was denied on March 4, 1981. This Petition for Writ of Certiorari follows:

STATEMENT OF THE FACTS

The facts which form the basis upon which Certiorari is sought are fully set forth in the Circuit Court decision. "The declarant, Quick, plainly was unavailable as a witness. Quick had been convicted on the same conspiracy charge (before the same trial judge) a month earlier; he was called as a prosecution witness in Appellant's case and invoked the Fifth Amendment. He was, immediately, granted immunity, but still refused to testify, deciding, apparently, that he was better off going to jail for contempt then testifying." The trial court, pursuant to Federal Rules of Evidence 804(b)(3) then admitted, "an out of court statement of one, Jack Quick made to two FBI agents." The Petitioners submitted at trial and continued to submit on appeal that the introduction of said out of court statements made by Jack Quick, although admissible under Federal Rules of Evidence 804(b)(3), were still in violation of their Sixth Amendment rights to confrontation.

ARGUMENT

THE OUT OF COURT DECLARATIONS AND CONFESSIONS OF A CO-DEFENDANT ADMITTED PURSUANT TO FEDERAL RULES OF EVIDENCE 804(b)(3) VIOLATED THE DEFENDANTS' SIXTH AMENDMENT RIGHT TO CONFRONTATION.

The right of confrontation has long been recognized to be one of the most cherished rights exercised by United States citizens and residents. "The right of confrontation is an essential and fundamental requirement

for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, L.Ed.2d 923 (1965). "The right of confrontation is basically a trial right. It includes both the opportunity to cross examine and the occasion for the jury to weigh the demeanor of the witness." *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). "One of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to access the credibility of the witness." *Berger v. California*, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969). It is through this right of confrontation and cross examination that the jury must evaluate the credibility of the evidence presented.

Obviously, the right of confrontation is not all encompassing since such an interpretation would require all hearsay statements to be declared unconstitutional. However, neither is the inter-relationship between the hearsay rule and the right of confrontation totally overlapping. As announced by the United States Supreme Court in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970):

> While it may readily be conceded that heresay rules and the confrontation clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete ad that the confrontation clause is nothing more or less than a codification of the rules of hearsay and the exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation

of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

The question raised in these proceedings is the interrelationship between the Defendants' right of confrontation as guaranteed by the Sixth Amendment to the United States Constitution, and Federal Rules of Evidence, Rule 804(b)(3). Rule 804(b)(3) provides for the admission of declarations against penal interest. This statutory exception to the hearsay rule was not recognized at common law and did not exist until the passage of the Federal Rules of Evidence in 1975. This rule, however, directly conflicts with both prior and post United States Supreme Court decisions which have considered the scope of the confrontation clause.

It has long been recognized that the out of court confession or declaration of a co-defendant may not be utilized against the defendant in the absence of the declarant taking the stand and being subject to cross examination. *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314, (1966); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). The declaration of co-conspirators is only admissible when the declaration of each co-conspirator is considered to be the statement of all under agency law. *Anderson v. United States*, 417 U.S. 211 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974). Thus, "a co-conspriators hearsay statements may be admitted against the accused for *no purpose whatever*, unless made during and in furtherance of the conspiracy." *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Nor does the fact that the officer to whom the statement of the co-defendant had been made was subject to cross examination alter the defendants' right to confrontation of the declarant. For example, in *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965) a statement of a co-defendant who refused to testify at the time of trial was utilized. The court emphatically ruled that, "since (the law enforcement officers) evidence tends to show only that (co-defendant) made the confession, cross examination of them as to its genuiness could not substitute for cross examination of (co-defendant) to test the truth of the statement itself."

In evaluating the defendants' right to confrontation when a co-defendant's confession is utilized, the court recognized that the introduction of the co-defendants' confession was improper. *Bruton v. United States*, 391 U.S. 123 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). "The statement was . . . admissible against the declarant . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as Petitioner is concerned and we initimate no view whatever that such exceptions necessarily raise questions under the confrontation clause." See note three.

In an attempt to create a new exception to the hearsay rule, Federal Rules of Evidence 804(b)(3) was created. Under said rule, declarations against penal interest may now be introduced in a court of law as an exception to the hearsay rule. This statute, however, does not and cannot address itself to the limited applicability of declarations against penal interest in criminal trials, when used in violation of a defendant's right to confrontation. It must be noted that it is only

when the government attempts to utilize declarations against penal interest in criminal prosecutions that the conflict with confrontation arises.

Although, the legislature has attempted to create a new exception to the hearsay rule, and arguably to the right of confrontation, said exception has not yet been recognized by the United States Supreme Court in its case law decisions. Rather, the court has ruled that, "traditional 'exceptions' to the hearsay rule, which permit the introduction of evidence despite the absence of the declarant . . . dispensing altogether with the literal right to 'confrontation' and cross examination, had been subjected on several occasions to careful scrutiny by the court." *California v. Green, supra.* This declaration against penal interest exception is not a long standing or historically recognized exception which was already in existence at the time the Sixth Amendment was framed. It is not an exception which the founding fathers accepted as an exception to the right of confrontation. As such, the creation of this new exception to the right of confrontation can only be made by the United States Supreme Court after careful scrutiny. See *California v. Green, supra.*

In the case at bar and in *United States v. Alvarez,* 584 F.2d 694 (5th Cir. 1978), the Fifth Circuit Court of Appeals has recognized a declaration against penal interest as an exception to the right of confrontation where the underlying declaration is sufficiently reliable. This evaluation is based upon the United States Supreme Court case of *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). It must first be pointed out that reliance upon *Dutton v. Evans, supra.*, for the creation of a new exception to the confrontation clause is

procedurally invalid since the case cannot be relied upon under the doctrine of stare decisis. In particular, there was no majority opinion in *Dutton v. Evans, supra.* Rather, the opinion upon which the Fifth Circuit places reliance is nothing more than a plurality opinion. In the absence of a majority opinion, as opposed to a plurality opinion, *Dutton v. Evans, supra.*, has no precedential value and no stare decisis effect. See *United States v. Hill*, 626 F.2d 429 (5th Cir. 1980), footnote 6; *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed.2d 796 (1942); *Hertz v. Woodman*, 218 U.S. 205, 30 S.Ct. 621, 54 L.Ed.2d 1001 (1910); *United States Exrel Radich v. Criminal Court of City of New York*, 459 F.2d 745 (2nd Cir. 1972); and *United States v. Friedman*, 528 F.2d 784 (10th Cir. 1976).

It must further be pointed out that the plurality opinion in *Dutton v. Evans, supra.*, merely recognized the state court (Georgia) definition of co-conspirators' statement which was broader than the federal definition. Since the Supreme Court had previously recognized the admissibility of co-conspirators' statements made during the commission of the conspiracy; *Wong Sun v. United States, supra.*, and *Anderson v. United States, supra.;* no new law was actually announced by the court. In addition, the statement which was ultimately admitted in no way directly implicated the defendant therein in criminal activity. The confession of Jack Quick admitted in the case at bar clearly and directly implicated these defendants' in criminal activities.

If the admissions and confessions of co-defendants can be utilized in criminal prosecutions against Defendants under the Fifth Circuit's interpretation of *United States v. Alvarez, supra.*, the exception has swallowed the

rule. Generally, the statements and confessions of a co-defendant are not admissible against the defendant in the absence of the declarants testifying. *Brookhart v. Janis, supra.; Gilbert v. California, supra.; Douglas v. Alabama, supra.;* and *Bruton v. United States, supra.* However, by definition, all confessions or statements made by a co-defendant which reflect his involvement in a crime are against his penal interests. Thus, if statements against penal interest are admissible, Federal Rules of Evidence 804(b)(3) has in effect overruled all the prior case law in this area of confrontation as announced by the United States Supreme Court. Clearly, such has not happened.

As late as 1979, the United States Supreme Court has reaffirmed the inadmissibility of co-defendants out of court statements and further reaffirmed the express dictates as announced in *Bruton v. United States, supra. Parker v. Randolph,* 442 U.S. 62 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). Although the *Bruton* issue of joint trial is not presented in this case, the law upon which *Bruton* is based, i.e., the admissibility of out of court declarations of co-defendants, is the total basis of defendants' argument herein.

In addition, it must be noted that the sole United States Supreme Court case which has alluded to the inter-relationship between the confrontation clause and declarations against penal interest expressly refused to decide the issue. *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Thus, it is the defendants' contention that the right to confrontation survives the hearsay exception

of statement against penal interest created by Federal Rules of Evidence, Rule 804(b)(3). Said right of confrontation has long prohibited the utilization of an out of court statement made by a co-defendant. *Brookhart v. Janis, supra.; Gilbert v. California, supra.;* and *Douglas v. Alabama, supra.* And, said right of confrontation has still been recognized by the United States Supreme Court even after the creation of the new legislation. See *Parker v. Randolph, supra.*

CONCLUSION

Based upon the foregoing citations, reasons, and theories, the Petitioners respectfully request this Honorable Court to grant it Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITION OF WRIT OF CERTIORARI was furnished by U.S. mail to DEBORAH WATSON, Department of Justice, Washington, D.C. 20530, DENVER RAMPEY, ESQUIRE, UNITED STATES ATTORNEY, Macon, Georgia 31202 and OFFICE OF THE SOLICITOR GENERAL, Washington, D.C. this 24 day of March 1981.

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Appendix

Opinion of the Fifth Circuit Court of Appeals

UNITED STATES of America,
Plaintiff-Appellee,

v.

Patrick Loring ROBINSON and
Matthew Wilford Madsen,
Defendants-Appellants.

No. 79-5730
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit B

Jan. 26, 1981.

Defendants were convicted before the United States District Court for the Middle District of Georgia, J. Robert Elliott, J., of conspiracy to possess marijuana with intent to distribute, with one defendant also convicted of using a facility in interstate commerce with intent to carry on illegal distribution of narcotics, and defendants appealed. The Court of Appeals held that: (1) statement of previously convicted coconspirator implicating defendants was properly admitted under hearsay exception, and (2) evidence that after the transaction fell apart defendants and others "kidnapped" one

individual to hold him hostage until the marijuana or previously paid purchase price was obtained was admissible.

Affirmed with instructions.

1. Criminal Law— 417(15), 419(5)

It was not error to admit, pursuant to hearsay exception, out-of-court statement made by one coconspirator to two FBI agents where despite immunity the declarant refused to testify when called as prosecution witness in defendants' case, in the statement he squarely implicated himself and defendants in subsequent conspiracy and such statement was trustworthy as it was taken in his own office when he was not in custody and had not been promised leniency if he would inculpate others and statement was fully corroborated. Fed. Rules Evid. Rule 804(b)(3), 28 U.S.C.A.

2. Criminal Law— 662(1)

Since coconspirator's hearsay statement implicating defendants was clearly against declarant's penal interest and was completely corroborated, its admission did no violence to defendant's Sixth Amendment right to confrontation. Fed. Rules Evid. Rule 804(b)(3), 28 U.S.C.A.; U.S.C.A. Const. Amend. 6.

3. Criminal Law— 338(7)

Evidence that after subject marijuana transaction fell apart when the marijuana was not delivered, the defendants and others "kidnapped" another individual

to hold hostage until the marijuana or their money was obtained was not inadmissible as extrinsic to the charge of conspiracy offense, i.e., conspiracy to possess marijuana with intent to distribute; such evidence was highly probative of the conspiracy and extent of defendants' interests therein and was probative of specific intent and corroborated separately tried co-conpirator's statement. Fed.Rules Evid. Rule 403, 28 U.S.C.A.; Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

Appeals from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

Both appellants were convicted of conspiracy to possess 1000 pounds of marijuana with intent to distribute, 21 U.S.C. §846 (1976); appellant Robinson also was convicted of using a facility in interstate commerce with the intent to carry on the illegal distribution of narcotics, 18 U.S.C. §1952(a)(3) (1976). Appellants advance two points on this appeal: first, that the district court erred in admitting, pursuant to the hearsay exception of Fed.R.Evid. 804(b)(3), an out-of-court statement of one Jack Quick made to two FBI agents; second, that the trial court erred in admitting evidence of events allegedly constituting a second, distinct conspiracy that took place following the conclusion of the conspiracy charged in the instant case. Both points lack merit and warrant only brief discussion here.

[1,2] Rule 804(b)(3) authorizes a trial judge to admit, as an exception to the hearsay rule, "[a] statement which . . . at the time of its making . . . so far tended to subject [the declarant] to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true," provided that the declarant is "unavailable as a witness." The declarant, Quick, plainly was unavailable as a witness. Quick had been convicted on the same conspiracy charge (before the same trial judge) a month earlier; he was called as a prosecution witness in appellants' case and invoked the fifth amendment. He was, immediately, granted immunity but still refused to testify, deciding, apparently, that he was better off going to jail for contempt than testifying.

The statement was also plainly against the declarant's penal interest; he squarely implicated himself, and appellants, in the conspiracy charged in the indictment. The statement was introduced, through the agents, in Quick's trial on the charge, because it was probative of the conspiracy and his complicity in the offense.

Finally, there was ample evidence to corroborate the declarant's statement, authorizing the trial judge to find it to be trustworthy within the meaning of our holding in *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978), that "hearsay testimony is admissible under Rule 804(b)(3) only if 'corroborating circumstances clearly indicate the trustworthiness of the statement.' " Quick's statement was taken in his own office; he was not "in custody" at the time. Quick was told that he was a suspect in the conspiracy and was given a *Miranda* caution. The agents made no promises; they gave Quick

no reason to believe that it would help him with the government if he inculpated others, such as the appellants; Quick never attempted to shift the balance elsewhere. In short, Quick made a knowing and voluntary statement, one subsequently determined by the trial judge to be worthy of admission against Quick himself. When Quick's statement was offered against appellants, the trial judge found that the statement was fully corroborated by the totality of the evidence in the appellants' case and that the evidence developed at Quick's trial reinforced this finding. "The consideration of (an out-of-court) statement's trustworthiness raises a question of fact ordinarily to be reviewed according to a clearly erroneous standard," *United States v. Alvarez*, 584 F.2d at 694, 701, and we cannot say that the trial judge's finding of trustworthiness in this case can be overturned under that standard. Moreover, the admission of a rule 804(b)(3) hearsay statement so clearly against the declarant's penal interest and so completely corroborated as this one was does no violence to the defendant's sixth amendment right to confrontation.

[3] The evidence at trial established that, on August 18, 1978, the marijuana transaction the appellants, and others, had conspired to consummate fell apart; the marijuana, which had been paid for, was not delivered as planned. The government sought to establish that the conspirators, including appellants, continued through August 19 to locate the marijuana or to retrieve their money. In the process, the appellants, and others, "kidnapped" one Carl Roberts and took him to Quick's farm; their purported intent was forcibly to hold Roberts hostage there until the marijuana (or their money) was obtained. The appellants contend that this evidence is

inadmissible as extrinsic to the charged conspiracy offense; implicit in their contention is that any probative value the evidence may have had was "substantially outweighed by the danger of unfair prejudice." Fed.R.Evid. 403. We think the evidence was highly probative of the conspiracy and the extent of appellants' interest in it. It was probative, also, of specific intent, an important element of the offense. Finally, it was corroborative of Quick's statement to the FBI agents implicating himself and the appellants in the illicit venture. In sum, appellants' claims of error are meritless.

Since the imposition of sentence, the Supreme Court has held that it is improper for a court to sentence defendants found guilty of the charged conspiracy offense to a special parole term. *Bifulco v. United States*, _____U.S._____, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). Accordingly, the district court, following the issuance of the mandate, must amend appellants sentence to delete the special parole terms.

AFFIRMED with instructions.

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OCTOBER TERM, 1980

PATRICK LORING ROBINSON AND MATTHEW WILFORD MADSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the admission at trial of an out-of-court statement against the penal interest of the declarant violated petitioners' right to confront adverse witnesses.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 635 F. 2d 363.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981. A petition for rehearing was denied on March 4, 1981. The petition for a writ of certiorari was filed on March 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of conspiring to possess 1,000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 846. In addition, petitioner Robinson was convicted of using a

facility in interstate commerce with intent to carry on the illegal distribution of narcotics, in violation of 18 U.S.C. 1952(a)(3). Robinson was sentenced to concurrent terms of two years' imprisonment, to be followed by a special parole term of two years. Madsen was sentenced to two years' imprisonment, to be followed by a two-year special parole term.[1]

1. The facts adduced at trial showed that in July 1978 James Ricks informed Carl Roberts that he had recently acquired 3,000 pounds of marijuana and asked Roberts to locate a buyer for it (II Tr. 56-57).[2] Roberts ultimately contacted petitioner Robinson, who, along with petitioner Madsen, was seeking to purchase a large quantity of marijuana on behalf of one Jack Quick (II Tr. 60; III Tr. 87-88; IV Tr. 77-78). Robinson met with Ricks and struck a deal for the purchase of the 3,000 pounds of marijuana, later reduced to a 1,000 pound purchase (II Tr. 64-66, 69; III Tr. 92-93, 95, 185-190). In early or mid-August, petitioners gave Roberts $1,000 in "good faith" money, informing him that they were waiting for the balance of the purchase money to be delivered (II Tr. 70; III Tr. 97). After petitioners had failed once to produce the promised cash, Robinson renegotiated the deal (II Tr. 71-73, 76) and agreed to make a $75,000 down payment on August 17, 1978. On that day, Quick pooled money he had collected from various people, including petitioner Madsen, and gave it to Madsen for delivery. Madsen turned the money over to Ricks and Roberts (II Tr. 81-83; III Tr. 70-75; IV Tr. 8-12, 78-80). Ricks told Madsen that the marijuana was coming by truck and that Madsen should await his telephone call (II Tr. 85).

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[1] In light of *Bifulco* v. *United States*, 447 U.S. 381 (1980), the court of appeals instructed the district court to delete the special parole terms (Pet. App. 6).

[2] "I Tr." through "V Tr." refer to the five volumes of trial transcript.

Ricks called that evening and instructed Roberts to take Madsen to the "drop" location—an abandoned welcome station south of Thomasville, Georgia. Roberts and Madsen proceeded to the designated welcome station, but found no one and no marijuana (II Tr. 93). Throughout the following two days, petitioners and Quick unsuccessfully endeavored to locate either Ricks or the marijuana (II Tr. 107-121; III Tr. 152-155, 191-192, 214-219; IV Tr. 82).[3]

2. During the course of a pretrial hearing to determine whether certain out-of-court statements should be admitted as declarations of a co-conspirator, Quick appeared as a witness (I Tr. 78). Quick had been separately indicted and previously convicted for his role in the conspiracy. When the prosecutor questioned him concerning the marijuana scheme, however, Quick refused to answer, invoking his Fifth Amendment privilege against self-incrimination (I Tr. 79). Although warned that he had been granted immunity and that the court had ordered him to testify, Quick persisted in his refusal.[4] The prosecutor then requested that Quick be declared an unavailable witness pursuant to Fed. R. Evid. 804(a) and called FBI Agent Gary Ramsey as a witness. Ramsey testified (I Tr. 88) that several months after the events in question, he and another agent had interviewed Quick at Quick's office concerning the marijuana transaction. The agents identified themselves to Quick, informed him of the subject of the interview, and advised him of his *Miranda* rights (I Tr. 89). Quick stated that he understood his rights and signed a waiver form (*ibid.*). Quick then detailed his participation, and the roles played

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[3]A telephone call made by petitioner Robinson seeking a friend's help in locating Ricks (III Tr. 99-101) formed the basis for Robinson's conviction under 18 U.S.C. 1952(a)(3).

[4]He was subsequently cited for contempt (I Tr. 79-85).

by petitioners and others, in the marijuana conspiracy (*id.* at 91-100).[5] At the conclusion of the pretrial hearing the court ruled that Ramsey would be allowed to testify at trial as to Quick's statement to him (*id.* at 219). This ruling was reaffirmed at trial after reconsideration in proceedings outside the presence of the jury (IV Tr. 48-70). The district court allowed Ramsey to testify as to Quick's statement on the ground that the statement had been against Quick's penal interest, and its trustworthiness had been established (*id.* at 61, 69). Agent Ramsey was fully cross-examined by petitioners' counsel (*id.* at 84-153).

3. The court of appeals affirmed petitioners' convictions (Pet. App. 1-6). Noting that Quick's statement was against his penal interest, that Quick was unavailable as a witness at trial, that Quick's declaration was fully corroborated, and that the circumstances in which the statement was given substantiated its reliability, the court of appeals concluded that the admission of Quick's statement was authorized by Fed. R. Evid. 804(b)(3) and did "no violence to the defendants' sixth amendment right to confrontation" (Pet. App. 4-5).

ARGUMENT

Petitioners contend (Pet. 6-13) that the admission of Agent Ramsey's account of Quick's out-of-court declaration denied them an opportunity to confront Quick, in violation of the Sixth Amendment. Petitioners do not question, however, the lower court's conclusion (Pet. App. 4)

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[5]Quick stated the following: he had discussed the possibility of buying a large quantity of marijuana with petitioners on several occasions during the summer of 1978 (I Tr. 92-93); Robinson ultimately informed him that he could purchase some marijuana from Ricks in Valdosta, Georgia (*ibid.*). Quick then secured the purchase money and, on August 17, 1978, turned it over to Madsen, who was to deliver the money and obtain 1,000 pounds of marijuana in return (*id.* at 95). Following the abortive pick-up attempt that evening, Quick assisted petitioners in their efforts to locate Ricks and retrieve either the money or the promised marijuana (*id.* at 96-98).

that Quick's statement was adverse to his penal interest. Nor do petitioners dispute the court of appeals' conclusion (*id.* at 4-5) that Quick's statement was made in circumstances that established its trustworthiness, and that the statement was "completely corroborated." Quick's statement was accordingly admissible under the exception to the hearsay rule for statements against interest. Fed. R. Evid. 804(b)(3); *McCormick on Evidence* §§ 277-280 (2d ed. 1972).[6]

The court of appeals correctly concluded that, in the circumstances of this case, the admission of Quick's statement through Agent Ramsey's testimony did not run afoul of the Confrontation Clause. Although the two are not invariably congruent, the hearsay rule and the Confrontation Clause "are generally designed to protect similar values." *California* v. *Green*, 399 U.S. 149, 155 (1970). Accordingly, this Court has established the rule that

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. *Roberts*, No. 78-756 (June 25, 1980), slip op. 9-10 (footnote omitted). Analysis has been focused upon the presence of " 'indicia of reliability which have been widely viewed as determinative of whether a statement may be

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[6]Insofar as petitioners may be understood to question (Pet. 9-10) the power of Congress to create an exception to the hearsay rule not uniformly recognized at common law, the objection is frivolous. No constitutional restraint on such legislation other than the Confrontation Clause of the Sixth Amendment is cited. See note 8, *infra*.

placed before the jury though there is no confrontation of the declarant,' " and which " 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Id.* at 9, quoting *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972).

The courts of appeals generally, like the court below, have applied these principles in passing upon the admission of declarations against interest pursuant to Fed. R. Evid. 804(b)(3). Athough decisions in particular cases rest on the factual constellation presented, the lower courts have agreed that the admissibility under the Confrontation Clause of inculpatory out-of-court declarations by a declarant unavailable to testify at trial is to be determined by weighing the circumstances in which the declaration was made, the presence or absence of any motive to falsify testimony, the presence of corroborating evidence, and the significance of the out-of-court statement in the overall prosecution case. See *United States* v. *Guerra*, No. 80-1110 (2d Cir. Sept. 4, 1980), cert. denied *sub nom. Coletti* v. *United States*, No. 80-728 (Feb. 23, 1981); *United States* v. *White*, 553 F. 2d 310, 314 (2d Cir.), cert. denied, 431 U.S. 972 (1977); *United States* v. *Goins*, 593 F. 2d 88, 90-92 (8th Cir.), cert. denied, 444 U.S. 827 (1979). *United States* v. *Alvarez*, 584 F. 2d 694, 699-702 (5th Cir. 1978); *United States* v. *Palumbo*, 639 F. 2d 123, 129-133 (3d Cir. 1981) (Adams, J., concurring). Where an out-of-court declaration is neither critical to the government's case nor devastating to the defendant's, the declaration is corroborated, and the circumstances in which the declaration was made demonstrate reliability, the evidence has been held to be properly admitted. See *United States* v. *Guerra, supra*; *United States* v. *White, supra*; *United States* v. *Goins, supra*; cf. *United States* v. *Weaver*, 565 F. 2d 129, 135 n.7 (8th Cir. 1977), cert. denied, 434 U.S. 1074 (1978); *United States* v. *Scholle*, 553 F. 2d 1109 (8th Cir.), cert. denied, 434 U.S. 940 (1977).

In the circumstances of this case the challenged evidence bore sufficient indicia of reliability to justify its admission. Nothing in the record suggests that Quick's statement was or was likely to have been a self-serving attempt either to shift blame to another or to curry favor with the authorities. At the time the agents interviewed Quick concerning the conspiracy, Quick had no reason to believe that a confession likely to send him to prison would serve his interest or that he would be advantaged by incidentally incriminating other persons. The agents made no threats or promises and fostered no hopes of leniency. No "plea bargaining" of any kind occurred. On its face, the statement made no attempt to shift the blame to others; Quick freely acknowledged that he played a major role, if not a leading role, in the conspiracy. In short, the statement could not plausibly be viewed as an attempt by Quick to sacrifice others to save himself.

Moreover, Quick's statement was by no means crucial or devastating, compare *Dutton* v. *Evans*, 400 U.S. 74, 88-89 (1970), for it did not dispositively bolster an otherwise weak case against petitioners. The statement was overwhelmingly corroborated by the government's three principal witnesses, Carl Roberts, Phillip Martin and Stephen Roberts. These witnesses fully detailed petitioners' involvement in the conspiracy. Their description of the plan and petitioners' role in it was more explicit than Quick's, and it corroborated every important detail included in Quick's statement (II Tr. 61-124; III Tr. 81-101, 142-148). Many of the less important details in the statement were corroborated by other evidence such as bank records (III Tr. 70-75), telephone company records (IV Tr. 35-40), and other witnesses (III Tr. 191-192, 214-219, 227-229). In view of the extent of the testimony inculpating petitioners, Quick's statement was of peripheral significance at most. Moreover, petitioners fully exploited their opportunity to cross-examine Ramsey on

the circumstances under which the statement was made (IV Tr. 84-153).[7]

Finally, the trial court instructed the jury (V Tr. 118-119) that Quick's statement to Ramsey constituted accomplice testimony and that the jury "must weigh it with caution and great care and * * * must consider the inducements for such testimony, the interest of the witness, the expectations of the witness or any other reasonable factor which might influence this testimony." In these circumstances, both courts below correctly concluded that, when Quick became unavailable, admission of his statement did not violate petitioners' rights under the Confrontation Clause.

Petitioners' contention that the decision of the court of appeals is contrary to the teaching of this Court is unfounded. *Douglas* v. *Alabama*, 380 U.S. 415 (1965), and *Bruton* v. *United States*, 391 U.S. 123 (1968), on which petitioners primarily rely, are readily distinguished. The evidence held to have been erroneously placed before the jury without cross-examination in *Douglas* was the only direct evidence of a key fact in issue, 380 U.S. at 419, and was described as "a fundamental part of the State's case * * * [which] added critical weight" thereto. *Id.* at 420. See *Dutton* v. *Evans, supra*, 400 U.S. at 87; *Parker* v. *Randolph*, 442 U.S. 62, 74 (1979) (opinion of Rehnquist, J.). In *Bruton*, the evidence held inadmissible was hearsay, not admissible under any applicable exception with respect to the petitioner, and the Court noted the critical weight of the particular evidence in the setting of the case. 391 U.S. at 128. The Court emphasized that it "intimate[d] no view

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[7]Since Quick's personal knowledge of the identity and role of other participants in the drug scheme was abundantly established by other evidence at trial, "[i]t is inconceivable that cross-examination could have shown that [Quick] was not in a position to know whether or not [petitioners were] involved in the [conspiracy]." *Dutton* v. *Evans*, 400 U.S. 74, 88-89 (1970) (opinion of Stewart, J.).

whatever that * * * exceptions [to the hearsay rule] necessarily raise questions under the Confrontation Clause." *Id.* at 128 n.3. The admissibility of the out-of-court declaration in this case under Fed. R. Evid. 804(b)(3) and the cumulative character of the evidence at issue here serve to distinguish this case from *Bruton*. See *Ohio* v. *Roberts, supra*, slip op. at 9-10; *Dutton* v. *Evans, supra*, 400 U.S. at 82-90.[8]

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[8]Contrary to petitioners' contention (Pet. 9-10), the fact that the expansion of the declaration against interest exception to the federal hearsay rule effected by Fed. R. Evid. 804(b)(3) is of comparatively recent vintage does not preclude a determination that the indicia of reliability necessary to satisfy the Confrontation Clause are present as to evidence admitted thereunder. The exact contours of exceptions to the hearsay rule as they exist at any given point in time are not to be equated with the mandate of the Sixth Amendment. *Dutton* v. *Evans, supra*, 400 U.S. at 82. As the framers of Rule 804(b)(3) noted, "[t]he refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly* v. *United States*, 228 U.S. 243 * * * (1913)." Notes of Advisory Committee on Proposed Rules, Rule 804. Moreover, Rule 804(b)(3) was designed to reflect the trend of decisional law abandoning this limitation on the declaration against interest. *Ibid.* In framing Rule 804(b)(3), Congress deliberately chose not to freeze the development of the constitutional law of confrontation by codification. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 22 (1974); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 12 (1974). As noted above, page 6, the court below and the other courts of appeals have accepted the mandate of Congress in their careful application of the Confrontation Clause to limit the use of inculpatory declarations against penal interest, consistent with the decision of this Court. Thus, whether Rule 804(b)(3) is, as we contend, a "firmly rooted hearsay exception" as to which "[r]eliability can be inferred without more," *Ohio* v. *Roberts, supra*, slip op. 9, or whether on the other hand, it was necessary to find "particularized guarantees of trustworthiness," *id.* at 10, the decision of the court of appeals was plainly correct, and calls for no further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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